

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

ORIGINAL

77-4153

To be argued by
HERBERT BURSTEIN

United States Court of Appeals
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—v.—

PINTER BROS., INC.,

Respondent.

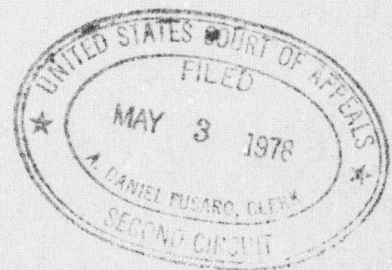
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P/S

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR PINTER BROS., INC.

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UNITED STATES COURT OF APPEALS
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NATIONAL LABOR RELATIONS BOARD,

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v.

PINTER BROS., INC.,

Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
PINTER BROS., INC., RESPONDENT

ISSUES PRESENTED

Whether there was substantial evidence on the record, as a whole, which supports the decision of the National Labor Relations Board ("Board") that: (a) on January 17, 1975, the Respondent violated §§8(a)(1) and (3) of the National Labor Relations Act [29 USC §158(a), et seq] ("Act") by discharging Vera Barber ("Barber"),

Beatrice Pagliarulo ("Pagliarulo") and by laying off Jayne Healy ("Healy") and Debra Gulbrandsen ("Gulbrandsen"); (b) Respondent constructively discharged Doris Bonadonna ("Bonadonna") in violation of §§8(a)(1) and (3) of the Act; (c) Respondent violated §§8(a)(1), (3) and (4) of the Act by subjecting Diane Lufker ("Lufker"), on and after August 21, 1975, to criticism, closer supervision, or by changing the terms and conditions of her employment as reprisal for Lufker's testimony at the hearings before the Board; and (d) by its letters and speeches, Respondent violated §8(a)(1) of the Act by threatening its employees with reprisals for supporting or assisting Truck Drivers Local Union No. 807, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Union") or by promising benefits to employees for refusing to join the Union.

STATEMENT OF THE CASE

Preliminary Statement

The Board has applied to this Court for enforcement of its Order dated January 12, 1977 [227 NLRB No. 123] pursuant to §10(e) of the Act and the jurisdiction of this Court to review the factual and legal basis for the Board's decision is clear.

STATEMENT OF FACTS

(A) The Board's Findings of Fact - Analyzed

What the Board has done is to fragment this case and by obscuring the underlying facts, created a mosaic of four cases, as if there were separate, distinct and unrelated proceedings.

It is fundamental principle that the discharge of an employee is suspect if it is prompted by a motive to discourage protested activity. This, obviously, presupposes knowledge by the employer of the alleged discriminatee's union activities prior to discharge. In this case, the discharge of Barber and Pagliarulo occurred prior to January 20, 1975 and the General Counsel acknowledged that he had not established knowledge by Respondent of union activity before January 20, 1975 [Tr. 1477-1478].⁽¹⁾

Thus the General Counsel said:

"MR. WEINRICH: In the General Counsel's direct case certain evidence was introduced in support of the 8(a)(3) allegation of the Complaint to establish union knowledge, company knowledge of the union activity.

"During the Respondent's case in chief Mr. Robert Pinter and especially Mr. Joseph Pinter, Sr. denied any

(1) References to the transcript of proceedings are preceded by "Tr."; references to the Board's decision are preceded by "D"; references to the decision of the Administrative Law Judge are preceded by "JD"; references to General Counsel's exhibits are preceded by "GCX"; Respondent's by "EX".

"knowledge of union activity prior to January 20, 1975, not only did they deny any knowledge of union activity, but in answer to questions by counsel for Respondent they denied any inkling of knowledge, any glimmer of knowledge of union activities.

"I am going to in my case in rebuttal establish that there was knowledge prior to January the 20th, 1975 rebutting the testimony of Robert Pinter and Joseph Pinter, Sr. and I hope eriously." [Tr. 1477-1478]

The following colloquy then ensued:

"MR. LANE: I think it is part of his direct case and not rebuttal.

"If he is going to impeach the credibility of our witness through statements of something like this, this is something to be done on direct.

"We had every opportunity to call this witness in many times prior to this.

"It is not proper rebuttal evidence."⁽²⁾

"JUDGE RIES: I agree." [Tr. 1478]

Respondent suggests that the Board's statement of facts is incomplete and unreliable. Thus to overcome the fact that there was no proof of anti-union animus or knowledge of union activity on Respondent's part, the ALJ assembled a jigsaw of unconnected events in order to reach the tortured conjecture that Respondent had knowledge of organizational activity by the Union and of the identity of the participants in that activity. By an exercise in circumlocutory reasoning the Board says that since there were dismissals and layoffs it must be concluded that the Respondent had to know about the

(2) Respondent later waived the objection to the proffered evidence [Tr.1525]. A review of the testimony proves that the Pinters had no knowledge of Union activity prior to January 20, 1975.

organizational efforts of the Union and the role of the alleged discriminatees in those efforts.

The factitious nature of the conclusions reached by the ALJ, which the Board adopted, are quickly exposed by analysis of the so-called facts recited by the Board in its brief.

1. The Board relies upon the fact that on Friday, January 10, 1975; Monday, January 13, 1975; Wednesday, January 15, 1975 and Thursday, January 16, 1975 employees congregated during the lunch hour. This, says the Board, put Respondent on notice that concerted organizational activities were under way. The record, however, discloses that Respondent's employees normally congregated in the parking lot at Respondent's place of business, either at lunch or after work [Tr. 452]. It was also commonplace for employees to eat lunch off the premises [Tr. 1003; 1077-1078]. These tenuous strands are then tied into an equally transparent skein with other palpably innocuous events. Thus, after the January 19, 1975 luncheon meeting, when it is suggested that thirteen clerical employees decided to present grievances to Robert Pinter ("Robert") and Joseph Pinter, ("Joseph"), the participants returned and congregated in the lobby of the building [JD4; Tr.31-38; 688] and Respondent's Office Manager, Richard Jacoby ("Jacoby")

entered from the office area, opened the connecting door and said, "The door is not locked, you can come in." [Tr. 38]. This hardly ominous statement does not suggest, even remotely, knowledge of protected, concerted activity. No one could or did testify that Jacoby overheard any part of the conversation or that any of the employees were discussing union organization at that time. On the contrary, Barber confirmed that it was not unusual for Jacoby to be in the lobby, and that he did not reprimand anyone for being there or for talking [Tr. 77].

2. It is alleged that when a group of clerical employees went out to lunch on Thursday, January 16, 1975, they were observed by Jacoby and Joseph from Respondent's dispatch office window. The record shows not only that the departure of employees for lunch off-premises was common, but it was normal for managers to use the dispatch office window to observe the arrival and departure of trucks. It can hardly be said that the employees off-premises lunches, or Jacoby's comment, or the sight of managers at the dispatch office window reached the stature of reliable circumstantial evidence of awareness of organizational activity.

3. The third monumental event relied upon by the Board, took place on the evening of January 17, 1975, when Barber and Pagliarulo waited in the parking lot after

work in order to speak to the night-shift employee Linda Sinclair ("Sinclair") [Tr. 53-59]. While awaiting Sinclair's arrival, Joseph left the building, got into his car, drove past Barber and said, "How are my lovely night girls?" and wished them a good week-end [Tr. 56]. He then drove some distance, stopped, purportedly looked in his rear-view mirror and made a U-turn. He parked his car and re-entered the building [Tr. 54-56]. It is, of course, questionable that Barber, in the dark of 5:30 P. M. on January 17, 1975, could discern Joseph looking into his rear-view mirror. Joseph testified that he returned to the building because he recalled a matter he had forgotten and to tell Robert that Barber (who has been discharged) was still present [Tr. 1213-1214; 1269]. To begin with, it was not unusual for Joseph to return to the terminal after working hours [Tr. 456]. Joseph and Robert testified that the decision to dismiss Barber and Pagliarulo had been reached before 5:30 P. M., but after quitting time on January 17, 1975 [Tr. 1211], Robert decided not to call these employees back. He elected to notify them of their dismissal by telegram, which he did [GCK 3,6] at approximately 6:30 P. M. that night.

Linda Sinclair testified that when she arrived for work that night, Barber said "hello" to her. Joseph

was in the building when she came in. Joseph made no inquiry of any kind about union solicitation [Tr. 527] and she testified that it was not unusual for Joseph to be present when she arrived for the night-shift [Tr. 527]. On the basis of this innocuous event, the ALJ inferred and the Board now asserts that Joseph somehow became aware that Barber and Pagliarulo were organizing for the Union [JD 21-22].

4. The ALJ also surmised that the unpartitioned working area for the clerical employees, and the proximity of Healy's desk to Robert's gave management easy access to the employee's union discussions. The fact is that the work area consisted of two floors. Respondent's clerical unit aggregated thirty-nine (39) persons at that time. There was no testimony at all that any discussions about grievances or union organization took place in the presence of management or its supervisors.

Lufker, for example, testified that she never observed "either a company official nor a supervisor in the vicinity of any(employee) meeting or appearing to surveil the meetings". [Tr. 634]. Healy said that despite the proximity of her desk to Robert's no one in management knew of her union sympathies [Tr. 373]. Pagliarulo affirmed that no management representative ever observed or

"spied on" employee meetings [Tr. 265-266]. These are the incontrovertible facts which the Board elects to disregard.

5. The General Counsel also alleged that, on January 10, 1975, a supervisor, Catherine Turk, asked employee Charlotte DeStefanis if she "had heard any of the girls talking about a union..." DeStefanis was unable to date this event accurately, but guessed that it was before she signed a union card [JR 14].

6. The Board also credits the unusual story that Lufker overheard a conversation sometime in February 1975 when Jacoby allegedly told Controller Charles Brown, "I told the old man not to fire those two girls, but he said no because he doesn't want the union in." [JD 14, 20; Tr.627]. It was an understatement when the ALJ commented that "this is a rather remarkable statement to overhear". [JD 20]. Plainly, she performed this feat of auditory acuity while walking by a table. Significant, too, is the fact that Lufker failed to relate this event, from February 1975 when she allegedly overheard the conversation, until the hearing in July 1975, and she did not inform the Union that it occurred. Indeed, the only person to whom she supposedly recounted this extraordinary conversation was another employee, Casilli, who was not called to verify it [Tr. 652;657].

Joseph and Robert denied that Jacoby ever asked them not to fire anyone [Tr. 1094; 1243]. Jacoby emphatically disclaimed the conversation [Tr. 1360-1361].

These are the events which purportedly occurred before January 20, 1975 and upon these, the General Counsel and the Board reason that Respondent had knowledge of organizational activity.

7. The fact is that the General Counsel has failed to lay the essential foundation of a history of anti-union animus. The record shows that Respondent never opposed, or encouraged, union organization. Indeed, Respondent's truck drivers and freight handling personnel have been represented by the Union for more than twenty years. Moreover, every one of General Counsel's witnesses disclaimed any interference by Respondent in their discussions or organization. Further, there was no evidence that any of Respondent's supervisors or managers conducted any surveillance of employee meetings. With the questionable exception of Catherine Turk, none of Respondent's managers or supervisors interrogated employees about the Union. Outside of the formal campaign meetings (more on these later), Respondent's supervisors and managers never made a single anti-union comment to employees. This was confirmed by DeStefanis who said that neither Joseph, Robert nor Jacoby

ever said anything about joining or not joining a union [Tr. 757-758]. Barber said management never interfered in employee discussions [Tr. 70] and no threats of reprisals were ever made [Tr. 92-93]. Barber never heard management promise a benefit if the employees were to reject union organization [Tr. 92], and Barber knew of no other employees who had suffered interference, threats or promises [Tr. 451].

Pagliarulo knew of no one who was questioned by management, threatened or otherwise interfered with [Tr. 265-266]. Sinclair said that the management never threatened that if the "Union was voted in", anyone would be laid off [Tr. 472]. This confirmed the fact that, except at the open meeting called by Respondent, nobody in management said anything about joining or not joining a union [Tr. 757].

Robert testified, without contradiction, that he never discussed unionization with any employees [Tr. 978]. Neither he, nor any other supervisor, ever threatened employees [Tr. 978-980] and Bonadonna confirmed this. [Tr. 1621-1623]. Besides, it was overwhelmingly proven that no employee was prevented from discussing grievances or organization at any time [Tr. 266].

The Board's witnesses repeatedly said that there was no surveillance, employees were not questioned, and

the whole subject of unions was avoided except in carefully composed speeches and letters mailed and distributed by Respondent [Tr. 974-977;978-979;982-983;1235]. To put it simply, the General Counsel did not, because he could not, show any anti-union animus.

(B) The Discharge of Barber and Pagliarulo

Having assumed that Respondent must have known about the organizational activity of the Union, the Board concludes that the motivation for the discharge of Barber, Pagliarulo and the layoff of Healy and Gulbrandsen was the unproven knowledge of union activity. As support for this dubious thesis, the General Counsel documented the pro-union activities of Barber and Pagliarulo during a period in late 1974, but there was not a scintilla of evidence that Respondent was aware of their union activities. The fact is that the two employees were discharged for their flagrant abuse of telephone privileges, for their attitude toward discipline and, in part, because of a proven decline in Respondent's business. Had Barber and Pagliarulo properly responded to the Respondent's warnings, they would have continued working because the record shows that Respondent did not normally lay-off when the volume of its business was reduced.

The plea of economic necessity was not a charade.

The essential background is that in the last quarter of 1974, Respondent's business declined between 5% and 15% [Tr. 911]. Respondent submitted incontestable economic data which explained the reduction in its clerical workforce between January and March 1975. A major factor was the recession which affected the trucking industry with particular severity. Decreased revenues were accompanied by rising fuel costs. (Ultimately, this led to the Respondent's abandonment of its trucking operations.)

The impact of these unfavorable economic conditions on the clerical unit was accelerated by a shift in the type of cargo the Respondent handled [Tr. 1383-1384] which called for less documentation and reduced clerical work. The implementation of a computer reporting and accounting process also affected the clerical unit. The computer program was not a response to Union activity; it was fully integrated by January 1975 [Tr. 914-915; 1043]. Computerization of the Respondent's clerical functions under a 1974 contract with IBM in July 1974 [Tr. 914; 1043] led to less paperwork, and correspondingly, less need for clerical employees [Tr. 604-614]. By January 20, 1975, the computer was no longer an experiment [Tr. 1056]. It is against this background and not an unproven anti-union animus that the treatment of Barber, Healy, Pagliarulo

and Gulbrandsen and the other reductions in staff must be viewed. The ALJ acknowledged that the deterioration in Respondent's operating ratio narrowed Respondent's margin of profitability to a point where an investment of an amount equal to the Respondent's net worth in a savings account would be more remunerative than operating its business [JD 26]. In an attempt to arrest the downward trend, productivity studies were implemented, including a survey of local telephone calls, prior to the commencement of union activity, either at the end of December 1974 or the first three days in January 1975 [Tr. 907; 913; 9206; 1101]. Respondent had received customer complaints that its telephones were often busy [Tr. 920]. The month of November 1974 was chosen at random for the survey [Tr. 92]. The earliest date assigned to Union activity was January 13, 1975 [Tr. 1473-1474]. Clearly, then, the telephone survey was not employed as a device to identify Union adherents and to punish them. There was no nefarious scheme; the telephone survey was received and examined on January 15, 1975 [Tr. 1023]. On a list of calls of more than 5 minutes duration the most frequent offenders were Barber and Pagliarulo and neither denied the infractions [Tr. 45; 196; 950; 952]. Indeed, Barber admitted to having been warned about personal phone calls in July 1974 [Tr. 47]

and although Pagliarulo denied previous warnings [Tr. 205] she identified ten personal calls during November 1974 [Tr. 260-264].

After January 15, 1975 Pagliarulo's job (but not her salary) was changed to remove her from the phone [Tr.198-203]. Obviously dissatisfied with this change, Pagliarulo did very little work [Tr. 964]. She was indifferent to the results of the survey and her attitude was a major factor leading to her dismissal [Tr. 1263].

Respondent's three senior executives, Joseph, Robert and Jacoby decided to discharge Barber and Pagliarulo because of their abuse of telephone privileges [Tr. 986] and, also, to serve as an example to others [Tr. 103]. To be sure, Respondent's deteriorating economic picture was a persuasive factor as we shall show [Tr. 957; 1031] but Barber and Pagliarulo were dismissed because of their callous attitude to the Respondent's problems and but for this, Respondent would have suffered the costs of their continued employment, as it did with other employees, despite the compelling economic situation which, alone, would have warranted a sharp reduction in staff. In any event, after the dismissals, complaints about busy telephones ceased [Tr. 1061-1062].

Barber, who was a bookkeeper, testified that she knew business had declined at the end of 1974 [Tr. 75-76]. Pagliarulo, an on-hand clerk, confirmed that Respondent's business was on the downgrade [Tr. 232-233] and that her own performance was below standard [Tr. 233].

The fact is that Robert would not have dismissed Barber and Pagliarulo until he secured telephone surveys for September and October 1974 but the attitude of Barber and Pagliarulo and their apparent indifference to the Respondent's problems provoked their dismissal.

(C) The Layoff of Healy and Gulbrandsen

On Monday, January 20, 1975 Healy and Gulbrandsen reported to work at about 8:30 A. M. Failing to find their time cards, they consulted Joseph and Jacoby. Joseph told them they had been laid off because of the slump in business [JD 12; Tr. 319-320; 358]. Healy was a file clerk whose job was obsoleted by the implementation of a computer [Tr. 965]. Healy admitted that no one was hired to replace her [Tr. 367].

Gulbrandsen, a clerk-typist, was also terminated because of a decline in business [Tr. 319-320; 358]. Her claim that she had enough to keep her busy [Tr. 324] was obviously inaccurate [Tr. 332]. Because she was not qualified to do other work [Tr. 343-346] there was no way to retain her.

Particularly noteworthy is that layoffs had been discussed at the end of 1974 [Tr. 1217]. Action was deferred in the hope of a business reverse but when this did not occur, Joseph asked Jacoby to call Buldbrandsen and Healy to inform them of their layoff. Jacoby was unable to reach them [Tr. 1218]. Hence, they learned of their layoff when they arrived at work, around 8:30 A. M. Temporary employees who were retained, not to displace Healy and Gulbrandsen, but to provide skills related to computer key-punching and document coding. These skills were not possessed by any regular employee, including Healy and Gulbrandsen [Tr. 919].

The ALJ acknowledged that the evidence linking Healy and Gulbrandsen to any active role in the Union drive was "...not so cogent as that relating to Barber and Pagliarulo". [JD 24]. The incontrovertible fact is that at the time of hearing many employees who had also participated in union activities remained in Respondent's employ.

D.

The Purported "Constructive Discharge" of Doris Bonadonna

It was alleged that Bonadonna was terminated on September 5, 1975, after seven days of hearings had been held before the ALJ. Bonadonna did not testify in the

original proceeding and Respondent did not associate her with the Union campaign. Nevertheless, the General Counsel unaccountably asserts that some eight months after the Respondent became aware of the Union campaign, and after the close of hearings where her name was mentioned as being among those who signed cards for the Union, the Respondent allegedly coerced her (alone out of others who signed Union cards and who were identified at the hearings and were retained in their jobs) into quitting in retaliation for her organizational activity. The simple fact is that Bonadonna quit. Thereafter she requested reinstatement and Respondent refused this offer. No law of this land mandates that an employer must re-employ one who quits.

The circumstances under which she quit were simply these: she was called into an office where Robert and Joseph questioned her about the amount of work she had to do in her department, including her efforts to coordinate her work with other clerical employees in her department. No reference was made to the Union. This interview, which Respondents had the right to call, lasted 40 minutes, and both managers kept their voices at "an even tone". [Tr. 1597; 1605; 1610]. Indeed, she was told that her work was good [Tr. 1632].

When Bonadonna announced her intention to quit, Joseph asked her to reconsider her decision [Tr. 1635], but she was determined to leave. She also announced this decision to other employees. The evidence which even the ALJ credited was that Bonadonna was emotionally disturbed at the time the incident occurred [JD 27; 29; 31; 32].

The Board rejects this plain evidence. Instead, it credits the testimony of another employee, Clair Dorr, who supposedly attended a "victory party" after the Union's defeat on March 26, 1975 when Joseph purportedly said that he was hurt by Bonadonna's action in "turning" on him (3) [Tr.X314-X316]. Is it credible to accept this testimony when it is suggested that other dismissals supposedly came closely on the heels of the Union campaign and in Bonadonna's case, Respondent waited eight months to invoke retaliatory action?

E. The Working Conditions of Diane Lufker

The General Counsel alleged that Respondent's sick leave and lateness policy was altered in order to retaliate against Lufker [JR 35]. This absurd charge suggests that Respondent had no right to implement a conventional personnel policy because a union attempted to

(3) Transcript references preceded by an "X" indicate the transcript of the reopened proceeding.

organize Respondent's employees. To connect this policy with Lufker's union activity which had been known for eight months before her dismissal is patently absurd.

Lufker's record showed a high degree of absenteeism, i.e., 18 days in 6 months [Tr. 1673]. Lufker admitted that the Respondent's attendance policy applied equally to all employees [Tr. 1690-1691].

As to the allegation that after Lufker's testimony before the Board, she was subjected to closer supervision, is not suggested, even remotely, by the evidence of record. On one isolated occasion, Joseph criticized the method Lufker was using to photocopy a document. This hardly implicates proscribed employer scrutiny nor was this isolated event the occasion for Lufker's dismissal.

The Act does not require an employer to employ persons whose attendance is erratic and unpredictable. The ALJ and the Board presume to dictate business policy by finding that Respondent would "lose nothing" by allowing Lufker to work part days and whenever she elected to report for work.

Were the Board to accept such erratic, occasional attendance from its employees, Congress would surely call the Board Members to account.

F.

The Allegations of Threats
Violating §8(a)(1)

The facts relating to the pre-election speeches and letters are not seriously in dispute. Reference is, therefore, made to the Respondent's exhibits and substantiating documents, namely a three-page letter, dated February 19, 1975 [JD 41-42; GCX 1(f), Appendix A]; a two-page letter dated March 18, 1975 [JD 42; GCX 1(f), Appendix B]; and a two-page letter dated March 25, 1975 [JD 42; GCX 1(f), Appendix C]. A speech was also made by Joseph on March 24, 1975 and March 26, 1975 [JD 13, 45; Tr. 432]. The net of the campaign literature and speeches was Respondent's permissible comments about unions but a reaffirmation of the right of employees to join or not to join a union or to vote for or against a union.

RESPONDENT'S CONTENTIONS

1. The Board's findings of fact and conclusions of law are not supported by substantial evidence on the record, taken as a whole, and its decision in this case departs from decisional precedents without supplying a rational explanation for such departure.

2. The determination of credibility made by the ALJ which the Board accepted, is not binding upon this Court.

3. The inferences drawn by the ALJ and the Board from the evidence are not reasonable or justifiable.

4. The skillful marshalling of the facts by the Board to support the ALJ's decision does not rebut the compelling evidence of record that Respondent was not guilty of the violations charged in the complaint.

ARGUMENT

I

THE GENERAL COUNSEL DID NOT SUSTAIN HIS BURDEN OF PROOF AND THE BOARD'S DECISION THAT RESPONDENT WAS AWARE OF UNION ORGANIZATION BEFORE JANUARY 20, 1975 IS AN IMPERMISSIBLE INFERENCE BASED ON AN INFERENCE.

1. It is perhaps superogatory to point out that the General Counsel has the burden of proving a violation of the Act by a fair preponderance of credible and substantial evidence [Textile Workers Union v. NLRB, 386 F.2d 790 (2d Cir.1967)] and the Board's findings cannot rest on suspicion, surmise, implications or plainly incredible evidence. So, too, a discharge cannot be held to be discriminatory without proof that the employer had knowledge of an employee's union activity [NLRB v. Garner Tool and Die Mfg., Inc. 493 F.2d 263, 268 (8th Cir. 1974)].

Concededly, the credibility findings made by the ALJ are entitled to respect but they must be based upon substantial evidence on the record as a whole. Respondent

submits that the clear preponderance of the evidence shows that the findings of the ALJ are incorrect [NLRB v. R. O. Pyle Roofing Co., 560 F.2d 1370 (9th Cir.1977)].

In applying the substantial evidence test, courts need not rubber-stamp the Board's decision. When the so-called substantial evidence is isolated from evidence that fairly detracts from the Board's conclusion, the mandate of Universal Camera Corp. v. NLRB [340 U. S. 474, 487-491 (1951)] is that the reviewing court must consider the entire record, including the evidence opposed to the Board's view from which conflicting inference could be reasonably drawn. If the record, as a whole, "clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of the witnesses or its informed judgment on matters within its special competence," as it does here, the Board's findings must be set aside [*Id.* at 490].

Respondent concedes that if there are valid reasons for a discharge or layoff but the disciplinary action is demonstrably motivated by union activity, the Board's determination will be upheld [NLRB v. Fairview Hospital, 443 F.2d 1217, 1219 (7th Cir.1971)]. Clearly, when the evidence of knowledge of union activity is exiguous, and there is no reliable proof of anit-union feeling, the Board's determination will be

rejected [NLRB v. Gladding Keystone Corp., 435 F.2d,129, 131 (2d Cir.1970); NLRB v. Monroe Auto Equip.Co. 368 F.2d 975 (8th Cir.1966); NLRB v. Garner Tool and Die Mfg. Co., supra; NLRB v. United Parcel Service, Inc., 317 F.2d 912,194 (1st Cir.1963); NLRB v. Prince Macaroni Mfg. Co., 329 F.2d 803 (1st Cir.1964); NLRB v. Dixie Terminal Co., 210 F.2d 538, 54 (6th Cir.1954) cert. denied 347 U. S. 1015 (1954)].

The theory that even slight evidence of anti-union motivation will suffice is contrary to decisions by the United States Supreme Court which hold that anti-union animus must be the dominant or moving cause. It is only when the employer's conduct is palpably destructive of the right to organize that unlawful motivation is presumed to exist [NLRB v. Great Dane Trailers, Inc., 388 U. S. 26, 33(1967); NLRB v. Brown, 380 U. S. 278,287 (1965); American Ship Building Co. v. NLRB 38 U. S. 300, 311 (1965); NLRB v. Erie Resister Corp., 373 U. S. 221, 228 (1963); Radio Officers Union v. NLRB, 347 U. S. 17, 45 (1964)].

In NLRB v. Fibers International Corporation [439 F. 2d 1311, 1315 (1st Cir. 1971)] the Court held:

"...the Board has the burden of making a clear showing that the employer's dominant motive was not a proper business one, but union animus".

In that case, the Court, on rehearing, explicated the words "clear" and "dominant":

"To dominate means to control. The 'dominant' motive is the controlling or effective motive. We use this particular word because of its insistent quality, to remind the Board that its burden is to find that the improper motive was the one that in fact brought about the result.

"With regard to our use of the word 'clear' we do not mean, as the Board fears, that its burden of proof on this issue is any greater than it is on any other. However, our experience has been that from time to time the Board not only forgets that 'partially motivated' means effectively motivated, but forgets that an aura of even strong union animus is not sufficient in itself, once an adequate and proper business reason has been established. While, of course, an employer who had good cause to apply a particular sanction may in fact do so for an impermissible reason, in such circumstances the Board must have an affirmative basis for believing that the employer rejected the good reason and chose the bad. It is not enough, as in the case at bar, to ignore or denigrate the business reason, or to substitute speculation in its place." [p.1315]

We suggest that the presumption of illegal animus does not lead ineluctably to a finding that the Act has been violated:

"[S]uch situations 'inherently destructive employer conduct' present a complex of motives and preferring one motive to another is in reality the far more delicate task, reflected in part in the decisions of this Court, of weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct." [NLRB v. Erie Resistor Corp., supra, 373 U. S. at 228-229].

Clearly, there were testimonial conflicts but this does not mean that the ALJ conclusively resolved these [Penasquitos Village, Inc. v. NLRB, 565 F.2d 1074 (9th Cir.1977), 97 LRRM 2244]. The fact is, however, that on critical points i.e., Respondent's knowledge of the Union activities of the alleged discriminatees there was no conflict. There was simply no evidence of such knowledge on Respondent's part prior to January 20, 1975.

In this case, the Board adopted the findings of the ALJ which he drew from disparate evidence and inferred that Respondent not only knew of the Union organization, but knew the employees who participated in the campaign. From this fallacious premise, the Board infers that Respondent deliberately retaliated against its employees in violation of the Act. But conjecture is not substantial evidence. [Manning v. John Hancock Mutual Life Ins. Co., 100 U. S. 693 (1880); United States v. Ross, 92 U. S. 281 (1876)].

Relying upon inferences upon inferences, the Board incorrectly concluded that the Respondent violated the Act [See 5 ALR 3d 136, 137, §6]. Certainly, the existence of fact "A" may be inferred from proven fact "B" by relying on ordinary rules of reason and logic. But where a presumption is posited, the existence of fact "A" must be proved, not

inferred [Gausewitz "Presumptions in a One-Rule World", 5 Vand. L. Rev. 324 (1952), Wilkins v. American Export Isbrandtsen Lines, Inc. 446 F.2d 480 (2d Cir. 1971), cert. den. 404 U. S. 1018 (1972) rehearing den. 405 U. S. 969 (1972)].

This is a case in which, apparently, demeanor may be the basis of the credibility determination. In such an instance, testimonial inferences [NLRB v. Universal Camera Corp., 190 F.2d 429 (2d Cir. 1951) on remand from 340 U. S. 474 (1951)] may be sufficient to sustain a Board order although the ALJ's determination of credibility based on demeanor is not conclusive on the Board. [NLRB v. Jackson Maintenance Corp., 283 F.2d 569 (2d Cir. 1960)]. The fact that the ALJ believed that the Pinter lied, does not provide a basis for inferring knowledge of union activity prior to January 20, 1975. On the contrary, the General Counsel virtually admitted that there was no such proof. Although the Board may adopt the ALJ's testimonial inferences, it need not defer to his derivative inferences [NLRB v. Universal Camera Corp., *supra*, at p. 432; NLRB v. Interboro Contractors, Inc., 388 F.2d 495, 499-501 (2d Cir. 1967); Amco Electric v. NLRB, 358 F.2d 370, 373 (9th Cir. 1966); Ward v. NLRB, 462 F.2d 8, 12 (5th Cir. 1972)].

In this case, the inferences the Board drew are, if not

irrational, at least tenuous and unwarranted. Accordingly, the Court ought not accord any weight to the derivative inferences drawn by the Board [NLRB v. Universal Camera Corp., supra, at p.432; Pittsburgh-DesMoines Steel Co. v. NLRB, 284 F.2d 74, 87 (9th Cir. 1960)].

Even if the ALJ believed that the Pinters lied about certain of the facts to which they testified (and we dispute the fairness or rationality of that characterization), the fundamental fact that Respondent did not know of union activity before January 20, 1975 was never disproven. To overcome this total omission, the ALJ and the Board constructed a papier-mache of circumstantial evidence. Here, too, they failed to understand that the underlying circumstances must be proved and not presumed. [Chicago, Milwaukee & St. Paul Railway Co. v. Coogan, 271 US 472 (1926)]. The Board's theory cannot be established by circumstantial evidence unless the facts and circumstances relied upon are not only consistent with its theory, but are more probable than any other alternative. [4 Jones on Evidence 1972 ed.) §29:6, pp. 303-304]. To infer illegal motives from a complex of circumstantial evidence requires clear and convincing proof of a history of anti-union animus, proof of knowledge of organizational activities and deliberate efforts to forestall the selection of a union by the employees.

Among other things, interrogation by supervisors, neither alleged nor proved in this case, is a clue to motive which can bolster a case grounded upon circumstantial evidence [NLRB v. Schill Steel Products, Inc., 340 F.2d 568, 572 (5th Cir. 1965); NLRB v. Ambox, Inc., 337 F.2d 138, 142, (5th Cir. 1966); Virgin Islands Labor Union v. Caribe Construction Co., 343 F.2d 364 (3d Cir. 1965); A. J. Krajewski Mfg. Co. v. NLRB, 413 F. 2d (4) 673 (1st Cir. 1969)], but no such evidence is present here.

In NLRB v. Coats & Clark, Inc. [231 F.2d 567 (5th Cir. 1956)], the Court rejected the Board's findings against an employer where a valid employer motivation for discharges was as reasonable as the contrary Board findings and where the Board's decision was based on unreasonable inferences unsupported by substantial evidence on the record considered as a whole. [cf. NLRB v. Gala-Mo Arts, Inc., 232 F.2d 102 (8th Cir. 1956), quoted as precedent in NLRB v. Coletti Color Prints, Inc., 387 F.2d 298 (2d Cir. 1967)].

The General Counsel had the burden of proving discriminatory discharges. Courts do limit "the amount of strain the Board can place upon threadbare testimony."

[Miller Electric Mfg. Co., Inc. v. NLRB, 265 F.2d 225, (7th Cir. 1959); cf. Trailmobile Division, Pullman, Inc. v. NLRB 407 F.2d 1006, 1017 (5th Cir. 1969); NLRB v. Suniland Furniture Co.,

(4) There was one alleged instance of interrogation but even the Board discounts this.

387 F.2d 123, 124 (5th Cir. 1967); NLRB v. Monroe Auto Equipment Co., 392 F.2d 559, 560-561 (5th Cir. 1961)].

Derivative inferences may be drawn only from substantial and not conjectural evidence [NLRB v. Minnesota Mining & Manufacturing Company, 179 F.2d 323 (8th Cir.1950)]. Substantial evidence cannot draw its essence from guesses and suspicions. [Radio Officers v. Labor Board, 347 U. S. 17, 48-52 (1954); NLRB v. Fairmont Creamery Co., 169 F.2d 169 (10th Cir. 1948)]. A court will set aside a Board decision "when it cannot conscientiously find that the evidence supporting that decision is substantial when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." [Universal Camera Corporation v. NLRB, supra,; cf. NLRB v. Pittsburgh Steamship Company, 340 U. S. 498 (1951)].

To infer illegal motives from imagined circumstantial evidence requires proof of knowledge of the alleged concerted activities:

"Inference must be based upon evidence, direct or circumstantial, and not upon mere suspicion." [Osceola Country Co-Operative Creamery Association v. NLRB, 251 F.2d 61, 69 (8th Cir. 1958)].

In John S. Barnes Corp. v. NLRB, 190 F.2d 127, 130 (7th Cir. 1951), the Court ruled:

"An unlawful intent is not lightly to be inferred. It cannot rest on remote or speculative evidence. National Labor Relations Board v. Citizen-News, 9th Cir. 1943, 134 F.2d 970. It should not rest upon an inference which itself rests on an inference." [See, too, Salinas Valley Broadcasting Corp. v. NLRB, 334 F.2d 604 (9th Cir. 1964)].

NLRB v. Atlanta Coca Cola Bottling Company [293 F. 2d 300 (5th Cir. 1961)] involved multiple discharges. In that case, the Court ruled that a blanket finding by the Board that all discharges were discriminatory was "unacceptable" when the record was considered as a whole. The evidence in that case showed that the employer had no concrete knowledge or union activity even though patent anti-union animus was demonstrated. So long as the record supported legitimate management reasons for discharge, the Act was not violated.

"In this case, as in NLRB v. Walton Manufacturing Co., 5th Cir., 1961, 286 F.2d 16, 21 [41 LC Par.16,702], '[i]n the determination of whether there is substantial evidence and whether inferences are justified, a closer scrutiny of the record than might otherwise be required becomes necessary where, as here, questionable inferences have been drawn and where, as here, the Examiner has uniformly credited all of the General Counsel's evidence and generally disbelieved all of the employer's evidence.'" [cf. Weyerhaeuser Company v. NLRB, 311 F.2d 19 (7th Cir. 1962)].

A definitive statement of the scope of judicial review was enunciated in NLRB v. Miami Coca Cola Bottling Company, [222 F.2d 341 (5th Cir. 1955)] where the Court found that there

was no substantial evidence supporting the Board's conclusion that management knew of union organization. There, as in the case at bar, the issues involved could not be properly resolved on the basis of credibility alone. Indeed, we we have pointed out, credibility is not the exclusive province of an Administrative Law Judge [NLRB v. Payless Cashway Lumber Store, 508 F.2d 24 (8th Cir. 1974)], particularly when, as in the instant case, the ALJ uniformly credited General Counsel's evidence to the prejudice of the Respondent. Accordingly, enforcement was denied because the General Counsel did not sustain the burden of proof. [NLRB v. Alco Feed Mills, 133 F.2d 419 (5th Cir.1943); NLRB v. Tex-O-Kan Flour Mills, 122 F.2d 433 (5th Cir. 1941); NLRB v. Bay Smith Transport Co., 193 F.2d 142 (5th Cir. 1951)].

In Local #3, United Packing House Workers of America v. NLRB and Wilson and Company, Incorporated, [210 F.2d 325 (8th Cir. 1954)] the Court denied enforcement of an order reinstating discharged employees because there was neither evidence that the employer's conduct was prompted by union activities or membership or evidence warranting an inference of such motivation. At best, said the Court, there was evidence only of a suspicion or conjecture but this was not sufficient.

An example of circumstantial evidence which may be sufficient to establish a statutory violation is found in

NLRB v. Schill Steel Products, Inc., supra, where leadermen were instructed to report on employees who were talking about a union; employees were interrogated; word was passed around that union organizers would be discharged when discovered, and other threats were made before the discharges. It is obvious that nothing remotely resembling this conduct occurred in the case at bar. On the contrary, there was uncontradicted evidence, adduced from the General Counsel's witnesses, that there were neither interrogation, threats, promises or coercion.

The General Counsel did not provide unequivocal proof of Respondent's improper motivation for the discharges and the layoffs:

"...where an employer fires a union sympathizer, the General Counsel must show by substantial evidence that 'in the absence of the union activities he would have treated the employee differently.' [quoting] Frosty Morn Meats, Inc. v. NLRB, 296 F.2d 617, 621... NLRB v. Whitfield Pickle Company, 374 F.2d 576, 582 (5th Cir. 1967) |.

Proof of anti-union animus must be explicit:

"Fragmentary and unrelated suspicions are not sufficient in substance to transform a proper exercise of discharge into an improper one. American Smelting & Refining Corp. v. NLRB, 8th Cir. 126 F.2d 680; NLRB v. Sheboygan Chair Co. 7th Cir. 125 F.2d 436 (7th Cir. 1942). "[Montgomery Ward and Co., 157 F.2d 486, 491 (8th Cir. 1946)

and speculation and hypotheses are not substitutes for hard evidence;

"While the circumstances herein might raise a suspicion that the discharge was discriminatory, mere suspicion or surmise cannot be considered as evidence to support a finding of unfair labor practice. NLRB v. Shen-Valley Meat Packers, Inc., 211 F.2d 289, (4th Cir. 1954); Rockwell Mfg. Co., Kearney Division, NLRB Case #17-CA-1576, Sept. 16, 1960 (1960 CCG NLRB Par. 9217) cf. Jackson Tile Manufacturing Co. and Local 401, United Glass and Ceramic Workers of N. A., 137 NLRB No. 140 (1962); NLRB v. Huber & Huber Motor Express, 223 F.2d 748 (5th Cir. 1955)].

(A) It is against the framework of those principles that the discharges of Barber and Pagliarulo must be tested. The record shows that the decision to dismiss Barber and Pagliarulo was made at about 5:30 P. M. on Friday, January 17, 1975. The factual predicate for this decision antedated Wednesday, January 15, when Robert requested the telephone survey. Surely, an employer may dismiss an employee for any reason (or no reason), so long as dismissal is not punishment for suspected engagement in protected activity [NLRB v. Jones and Laughlin Steel Corp., 301 U. S. 1 (1936); Associated Press v. NLRB, 301 U. S. 103 (1937); Amalgamated Meat Cutters and Butcher Workers of North America, Local 364 v. NLRB, 435 F.2d 668 (9th Cir. 1970)].

Respondent did show that Barber and Pagliarulo admitted to misuse of the Respondent's telephones. When they were transferred to jobs that removed them from the telephones, their attitude and productivity deteriorated. Accordingly, when viewed in the perspective of the declining workload of the clerical unit, Respondent had the unquestioned right to terminate them.

It is not material that these two employees offered to pay for their telephone calls. Respondent operates a trucking service and not a telephone exchange. The use of the Respondent's telephones for the personal calls of employees deprived the Respondent of business, which it desperately needed and it is significant that after Barber and Pagliarulo were fired, customers stopped complaining that Respondent's telephones were chronically busy.

The General Counsel's failure of proof is twofold: first, there is absolutely no evidence that, on January 17, 1975 Respondent knew of Barber's and Pagliarulo's involvement in the Union campaign; and second, there is absolutely no evidence that Respondent decided to dismiss these employees with the clear, dominant and unequivocal intent to punish them for their union activity. If there is a balance of evidence as to motive, the Board must not infer an improper one, if a permissible basis is rational and reasonable. [NLRB v. Huber & Huber Motor Express, Inc., supra; NLRB v. Houston Chronicle Publishing Co., 211 F.2d 848 15th Cir. 1954); NLRB v. Blue Bell Globe Mfg. Co., Inc., 120 F.2d 974 (4th Cir. 1941)]. The Board may draw only reasonable, rational inferences from facts in evidence. [NLRB v. D'Armigene, Inc., 353 F.2d 406 (2d Cir. 1965)]. In the case at bar, there has been no showing that the balance can be tipped away from an exclusively permissible motive

by either awareness of union activity, or a history of anti-union animus.

(B) The Board also concluded that the discharges of Healy and Gulbrandsen violated §§8(a)(1) and (3) of the Act. This incomprehensible result is reached despite evidence that is "...not as cogent as that relating to Barber and Pagliarulo". [JD 24]. The tenuous grounds of this conclusion are:

(a) Joseph said on January 10, 1975 that if things "got bad", he would consider a 4-day week rather than releasing the least senior employees.

(b) By January 20, 1975, the 4-day week concept had been abandoned, and Healy and Gulbrandsen were laid off while employees with less "seniority" were retained. But there is no seniority in the absence of a labor contract, as the Board and the Courts have repeatedly held.

(c) There was supposedly inconsistent testimony about why these two employees were chosen for layoff.

(d) There had been no economic layoffs at Respondent's facilities since 1930, and reduction of the platform force was accomplished through attrition. But the recession occasioned layoffs throughout the United States.

(e) The proximity of Healy's desk to Robert's gave rise to an illusory presumption that Healy's union

sympathies were known to management, despite her statement that she never remembered Robert being around when she discussed the Union.

(f) Respondent's dismissal of Barber and Pagliarulo disclosed an anti-union animus, which presumably extended to Healy and Gulbrandsen.

(g) The timing of layoffs to approximately the time of a Union representation demand. But other Union sympathizers were not discharged.

(h) Joseph's failure to be cordial to a Union representative on his premises. But employers are not required to celebrate visitation by union organizers.

In any event, this tissue paper construction hardly approaches a clear showing of anti-union motivation. At least nine persons supporting the Union continued to work for the Respondent at the time of hearing and the General Counsel knew this.

The Act is not violated because an employer reduces its staff to effect operating economies. Unless the Board intends to rewrite economic theory, layoffs prompted by reasonable business requirements are unassailable. [Solo Cup Company and IBT Local 26, 208 NLRB No. 146 (1974); Carrollton Standard Printing Co. and Bindery Workers Independent Union, et al.].

209 NLRB No. 78 (1974); NLRB v. River Togs, Inc., 382 F. 2d 198 (2d Cir. 1967);.

Seniority is always a creature of contract [Trailmobile Co. v. Whirls, 331 US 40 (1947)] and there was no seniority roster at Respondent's office. Indeed, even when layoffs violate seniority, one does not infer a violation of the Act [Carleton-Stuart Corporation and Office and Professional Employees Union, Local 153 AFL-CIO, 197 NLRB No. 161 (1972)].

This is especially true where employees (like Healy and Gulbrandsen) were laid off. They were minimally-skilled employees whose jobs had become unnecessary because of computerization and the reduction in the volume of clerical work. Significantly, no one was hired to replace Healy and Gulbrandsen.

The Board has also employed the dismissals of Barber and Pagliarulo as a prop to support its conclusions about Healy and Gulbrandsen. This is an instance of one slender reed supporting another.

As to the timing of the layoffs to coincide with the demand for representation, the Board completely disregarded the testimony that Joseph had asked Jacoby to telephone Healy and Bulbrandsen at 7:30 A. M. on January 20 to inform them of their layoff. Jacoby could not reach them [Tr. 1217-1218].

There was no allegation that Joseph knew that a demand for representation would be made an hour later.

(C) The Board has ruled that Bonadonna was constructively discharged. Bonadonna quit her job. That much is not disputed. The Board holds that she was assaulted by threats and abuse by Robert and Joseph. This ordeal is supposed to have so overwhelmed her free will that her quit was tantamount to a discharge. Surely this one meeting does not amount to the degree and duration of oppression which equates with a "constructive discharge" [NLRB v. Palm Beach Broadcasting Corp., 155 F. 2d 805 (5th Cir. 1946)]. Criticism of an employee's work followed by her resignation is not a "constructive discharge" [Barker's East Main Corp., 136 NLRB 494 (1962); Wilson Concrete Co., Inc. and General Drivers & Helpers Union Local No. 554, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 150 NLRB No. 74 (1965)].

In short, there was certainly no substantial and credible evidence that Bonadonna was badgered into quitting. [Portage Plastics Co. and International Union, Allied Industrial Workers of America, AFL-CIO, 163 NLRB No. 102 (1967); NLRB v. Goshen Litho, Inc., 476 F.2d 662 (2d Cir. 1973)].

In Omark-CCI, Inc. and Teamsters Union Local 551, IBTCWHA, [208 NLRB No. 52(1974)] the Board said:

"It is settled that an employer is not guilty of a discriminatory discharge because an employee is upset at his anti-union actions or attitudes."

The Board provides no reason for accepting the ALJ's finding of credibility in favor of Bonadonna. He found her nervous and "easily moved to distraction". She admitted to being "hysterical" at the time of the interview and her perception and recollection of the events are accordingly, suspect. That the words chosen by Robert and Joseph to reprimand Bonadonna may have been intemperate, does not mean that her act in abandoning her work was provoked by badgering occasioned by knowledge of her Union activity. An employer has a right to be wrong. An employer's disciplinary rules may be Draconian, and still be consistent with the Act. [General Casket Co. and Upholsterers International Union of North America, Local No. 3, 225 NLRB No. 37 (1976)].

(D) Was Lufker unreasonably disciplined? It has been shown that Lufker's absenteeism was chronic. Additionally, when Respondent insisted on a full-day of work, Lufker admitted that it was applied to everyone [Tr. 1690-1691; Tr. X292]. Perhaps this is an unwise, or even unduly harsh, policy but it does not violate the Act [Central Casket Co., supra].

The General Counsel failed to show any intent to punish Lufker for Union activities. The "change" in personnel policy was not invoked to retaliate against Lufker for her testimony at the hearing [NLRB v. Northwestern Mutual Fire Ass'n., 192 F.2d 866 (9th Cir. 1944)]. Plainly, the policy was applied to all employees and that being so, there is no substantial evidence to support this conclusion of the Board that it was Lufker-oriented [Standard Electric Co. v. NLRB, 387 F.2d 717 (5th Cir. 1968)].

II.

THE FREE SPEECH GUARANTEES OF SECTION 8(c) PROTECTED RESPONDENT'S LETTERS AND SPEECHES.

The ALJ and the Board unaccountably found that Respondent's letters and speeches, all prepared by counsel based upon guidelines established by the Board, violated §8(a)(1) of the Act. To maintain this position, they must argue that the employees, hearing the speeches and receiving the letters, arbitrarily ignored Respondent's repeated statements that it intended to observe its obligation to bargain in good faith with any union selected by its employees and the iteration and reiteration of the employees' right to freely choose a union. A review of all three letters and the notes used by Joseph and Robert contradict any suggestion of impropriety.

As the United States Supreme Court said in
NLRB v. Gissel Packing Co. [395 U. S. 575, 618 (1969)]:

"...an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.' He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control. See Textile Workers v. Durlington Mfg. Co., 380 US, 263, 274 n.20." [Emphasis supplied] (pg. 618)

The Court continued, saying:

"As stated elsewhere, an employer is free only to tell 'what he reasonably believes will be the likely economic consequences of unionization that are outside his control', and not 'threats of economic reprisal to be taken solely on his own volition.' NLRB v. River Togs, Inc., 382 F.2d 198, 202 (CA 2d Cir. 1967)". (pg. 619)

The Respondent may convey his belief about "demonstrably probable" consequences. He need not prove his appraisal beyond a reasonable doubt.

The essence of the Board's objections to these letters and speeches is that they were effective and not that they exceeded the limits of permissible scope of §8(c) of the Act [Louisburg Sportswear Co. v. NLRB 462 F.2d 380 (4th Cir. 1972); NLRB v. Golub Corp., 388 F.2d 921 (2d Cir. 1967); Kaufman-Straus Co., d/b/a Kaufman's of Kentucky

and Retail Clerks Union Local No. 445, Retail Clerks International Association, AFL-CIO, 137 NLRB No. 18, (1962); Franklin Lumber and Basket Co. and United Brotherhood of Carpenters and Joiners of America, 139 NLRB No. 96 (1962); NLRB v. Automotive Controls Corporation, 406 F.2d 221, 223 (10th Cir. 1969); Chauffeurs, Teamsters and Helpers "General" Local 200, AFL-CIO v. NLRB, 233 F.2d 233, 237 (7th Cir. 1956); Union Carbide Corporation v. NLRB, 310 F.2d 844 (6th Cir. 1962)].

The principle is clear that:

"The efforts of an employer to convey the impression that a union would not be beneficial to employees are not prohibited if those efforts are not coercive. NLRB v. Enid Co-Op Creamery Ass'n., 10 Cir. 169 F.2d 906; NLRB v. Continental Oil Co., 10 Cir. 159 F.2d 326; Colvert Dairy Products Co., supra. In discussing with employees the pros and cons of the benefits of union representation, an employer has the right to compare present benefits with those of unionized plants so long as there is no coercion." [J. S. Dillon & Sons Storage Co. v. NLRB, 338 F.2d 395, 400 (10th Cir. 1964)].

In NLRB v. Yokell [397 F.2d 751 (2d Cir. 1967)]

it was pointed out that the inclusion of any utterance within the protection of §8(c) may depend on the employer's ability to control the untoward events he alleges may result from unionization. Respondent, in the case at bar, never said that the "untoward events" were within his power to control.

In Yokell, supra, the employer's statements were protected by §8(c) when he said:

"...if the Union got in and its demands were too high, he would have to raise prices and cut back production... he referred to several firms which had been forced to go out of business after becoming involved with a particular union." (pgs.756-757)

The Court in Yokell, supra, cited NLRB v. Golub Corp., supra and also ruled that a minor §8(a)(1) violation does not strip these utterances of protection under §8(c) [NLRB v. Virginia Electric & Power Co., 314 U. S. 469, (1941)].

In still another case, the Court suggested that an employer could inform its employees that should a union gain representation, the employer's facility would close, if the union's demands made continuation impracticable [NLRB v. Rollins Telecasting, Inc., 494 F.2d 80,82 (2d Cir. 1974), cert. den. 42 L.ed. 2d 178; NLRB v. Montgomery Ward & Co., 157 F.2d 486, 498 (8th Cir. 1946)].

In short, §8(c) accords an employer the freedom to tell his employees that: (1) if the employees joined the union, it might divert certain operations with a possible elimination of jobs, (2) employees received more benefits, as evidenced by a past history of concern for employees than through the promises of union organizers, (3) strikes could result from union demands [Southern Frozen Foods, Inc. and Laborers' District Council of Georgia and South Carolina, affiliated with Laborers' International Union of North America,

AFL-CIO, 202 NLRB No. 92 (1973); Orchard Corporation of America and St. Louis Printing Pressmen and Assistants Union of North America, AFL-CIO, 170 NLRB No. 141 (1968); Coronet-Western, a division of Coronet Industries, Inc. and Van Storage Drivers, Packers, Warehousemen & Helpers Local 389, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 203 NLRB No. 123 (1973); United Aircraft Corporation, Hamilton Standard Division (Boron Filament Plant) and Local 743, International Association of Machinists and Aerospace Workers, AFL-CIO, 199 NLRB No. 68 (1972); NLRB v. Hamilton Standard Division (United Aircraft Corp.), 490 F.2d 1105 (2d Cir. 1975)], (4) an employees' "advancement opportunities" would be hampered by unionization and from the "strife and tension" occasioned by the union.

We submit that substantial evidence does not subject the Board findings of fact and conclusions of law.

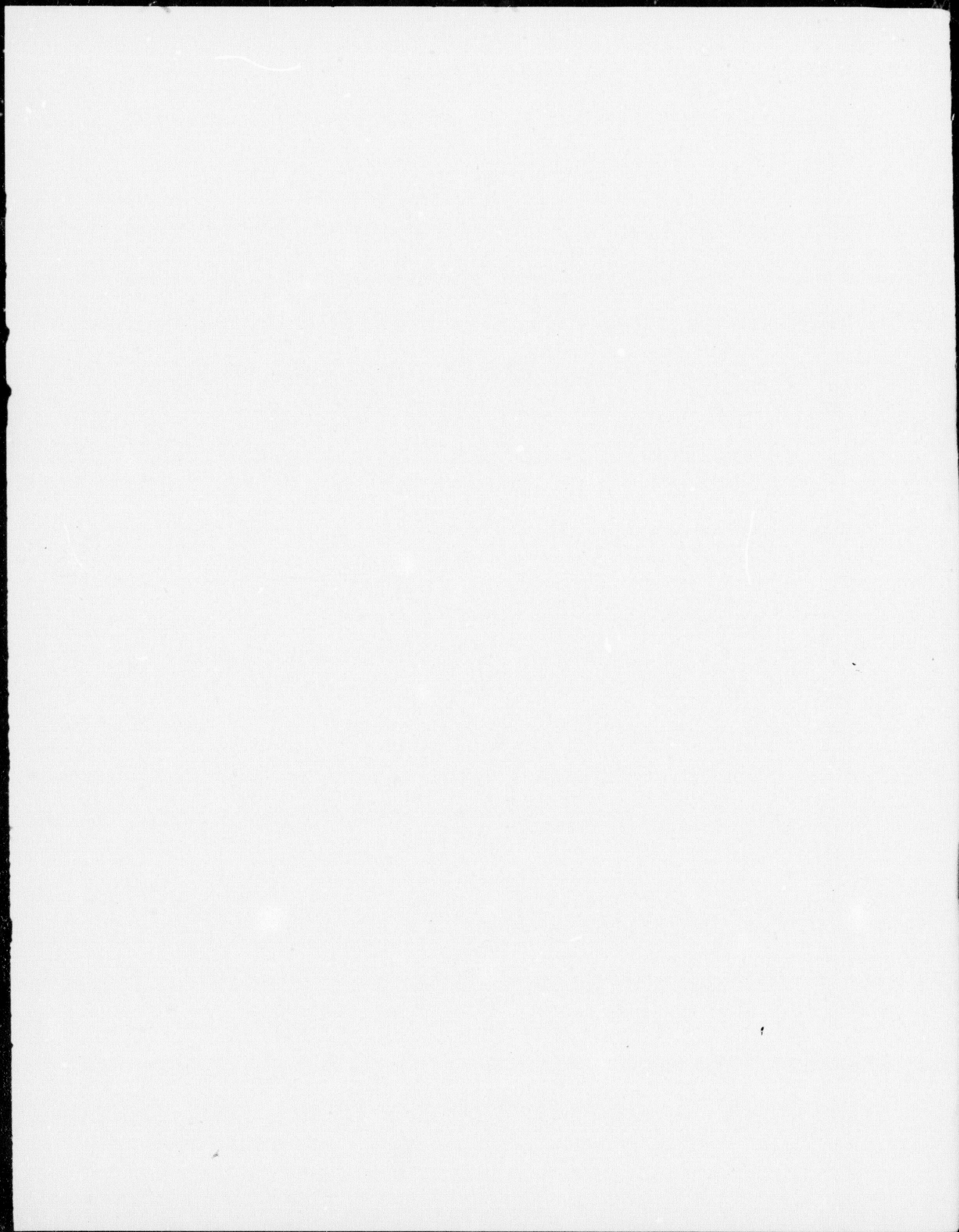
CONCLUSION

For all of the reasons set forth in this brief, this Honorable Court should deny enforcement of the Board's Order.

Respectfully submitted,

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On the Brief



STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Norman Friedman, being duly sworn, deposes
and says, that on the 3rd day of May 19 78~~xxxxxxx~~

~~xxx~~ he served the annexed Brief for Pinter Bros, Inc. in RE: National
Labor Relations Board v. Pinter Bros, Inc. No. 77-4153

upon Corinna L. Metcalf,

Esq(s)., Attorney(s)

for Petitioner

by depositing 2 true copies

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in a securely closed wrapper with the postage thereon prepaid, ad
dressed to said attorney(s) at (his/their) office
National Labor Relations Board, Washington, D.C. 20570

that being the address designated in the last papers served herein by
the said attorney.

Norman Friedman

Sworn to before me this 3rd

day of May

19 78

John Alusick

JOHN ALUSICK
Notary Public, State of New York
No. 31-4602133
Qualified in New York County
Commission Expires March 30, 19 80